

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DESMOND TORRENCE,	§
	§ No. 732, 2010
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0205014445
Plaintiff Below-	§
Appellee.	§
	§

Submitted: April 27, 2012

Decided: June 11, 2012

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

**ORDER**

This 11<sup>th</sup> day of June 2012, upon consideration of the parties' briefs, their supplemental memoranda, and the record on appeal, it appears to the Court that:

(1) The defendant-appellant, Desmond Torrence, filed this appeal from the Superior Court's order, dated November 3, 2010, denying his third motion for postconviction relief. We find no merit to Torrence's appeal. Accordingly, we affirm the Superior Court's judgment.

(2) The record reflects that Torrence was arrested in 2002 for the robbery and murder of a motel desk clerk. The crime was captured on the

motel's video surveillance camera and showed two masked men, similar in height, commit the robbery. Upon exiting the motel, one of the masked men turned around and shot the clerk in the face, killing him instantly. No physical evidence was recovered at the scene. Two months later, however, during a police interview on an unrelated matter, Earnest Cooper told police that he, Torrence, and Stephen Kattes, committed the robbery. Eventually Torrence and Kattes were arrested, and all three men were charged with robbery, murder, and related offenses. Prior to Torrence's trial, Cooper and Kattes pled guilty to Robbery in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony (PFDCF), and Conspiracy in the Second Degree. Kattes also pled guilty to Wearing a Disguise During the Commission of a Felony.

(3) At Torrence's trial, Cooper testified that all three men planned the robbery. Cooper had been assigned the task of driving the getaway car. While fleeing the scene, Torrence told Cooper that he had shot the clerk. Kattes testified similarly to Cooper as to the planning of the robbery. Kattes testified that when he and Torrence went into the motel, Torrence was the one who held the weapon and shot the clerk. The State also presented the expert testimony of an FBI agent who reviewed the motel's surveillance video. The expert opined that both masked men were approximately 5 feet 8

inches tall, which was consistent with the height of Torrence and Kattes, respectively. Cooper, at six feet four inches, was considerably taller.

(4) The record reflects that, on the subject of Torrence's codefendants' testimony, the trial judge instructed the jury as follows:

The testimony of an accomplice must be examined and weighed by the jury with particular care.

The jury should consider whether the testimony of the accomplice has been affected by self-interest, or by an agreement with the State, or by his own interest in the outcome of this case, or by bias for or against the defendant. The fact that an alleged accomplice has entered a plea of guilty to some of the offenses charged is not in itself evidence of guilt of the defendant.<sup>1</sup>

No objection was made to this jury instruction at trial.

(5) The jury convicted Torrence in September 2003 of Murder in the First Degree (felony), Robbery in the First Degree, Conspiracy in the Second Degree, and two counts of PFDCF. The jury acquitted him of Murder in the First Degree (intentional), the associated count of PFDCF, and Wearing a Disguise During the Commission of a Felony. Because it was a capital case, the Superior Court held a separate penalty hearing to determine whether Torrence should be sentenced to life imprisonment or death.<sup>2</sup> On November 19, 2004, the Superior Court followed the jury's recommendation and sentenced Torrence to life imprisonment.

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<sup>1</sup> In his supplemental reply memorandum, Torrence denies that this instruction was ever given to his jury. We reject Torrence's contention, which is clearly contradicted by the record on appeal.

<sup>2</sup> DEL. CODE ANN. tit. 11, § 4209 (2007 & Supp. 2010).

(6) After the verdict but prior to the penalty phase, Torrence moved for a judgment of acquittal, arguing that the jury's not guilty verdict on the charges of intentional murder and wearing a disguise implied that the jury found that he was not one of the masked men and had not fired the fatal shot. Torrence further asserted that the State had presented no evidence suggesting that he was the driver of the getaway car. On November 18, 2004, the Superior Court denied Torrence's motion, determining that:

The verdict . . . more likely reflects the jury's inability to decide what specific role [Torrence] played in the robbery but with a judgment that he was a participant. In other words, the jury must have been satisfied beyond a reasonable doubt that [Torrence] was an accomplice to the murder and robbery but not convinced that he was the trigger-man.<sup>3</sup>

(7) Torrence raised the denial of his acquittal motion on direct appeal, arguing that there was insufficient evidence to sustain his convictions because his acquittal of wearing a disguise implied that the jury believed he was not present in the motel when the clerk was shot. By Order dated November 2, 2005, we affirmed the Superior Court's judgment, applying the "rule of lenity"<sup>4</sup> to conclude that "[t]he jury was free to believe the testimony of Kattes and Cooper that Torrence was a participant in the

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<sup>3</sup> *State v. Torrence*, Del. Super., Cr. ID No. 0205014445 (Nov. 18, 2004) (sentencing opinion).

<sup>4</sup> This Court has held that inconsistent verdicts will be affirmed if the inconsistency can be explained by jury lenity. *Tilden v. State*, 513 A.2d 1302, 1306-07 (Del. 1986).

robbery, but . . . also entitled to reasonably doubt their testimony that Torrence was the shooter.”<sup>5</sup>

(8) In October 2006, Torrence, through counsel, filed his first postconviction motion, which claimed that Kattes had recanted his trial testimony. After an evidentiary hearing, the Superior Court denied the motion. Torrence did not appeal.

(9) Torrence filed his second postconviction motion in January 2010. In that motion, Torrence argued that, based upon this Court’s 2009 decision in *Allen v. State*,<sup>6</sup> the Superior Court’s jury instructions on the issue of accomplice liability were defective. The Superior Court denied Torrence’s motion. On appeal, we affirmed the denial of Torrence’s motion on the ground that it was procedurally barred.<sup>7</sup>

(10) Torrence filed his third motion for postconviction relief in September 2010. For the first time, Torrence argued that the Superior Court committed reversible error when it failed to instruct the jury on uncorroborated accomplice testimony consistent with *Bland v. State*.<sup>8</sup>

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<sup>5</sup> *Torrence v. State*, 2005 WL 2923501, \*3 (Del. Nov. 2, 2005).

<sup>6</sup> *Allen v. State*, 970 A.2d 203 (Del. 2009) (holding that when the State proceeds on a theory of accomplice liability for criminal offenses that are divided into degrees, the jury is required to make an individualized determination regarding both a defendant’s mental state and his culpability for any aggravating fact or circumstance).

<sup>7</sup> *Torrence v. State*, 2010 WL 3036742 (Del. Aug. 4, 2010).

<sup>8</sup> See *Bland v. State*, 263 A.2d 286, 288 (Del. 1970) (requiring that the trial judge instruct the jury to examine the testimony of an alleged accomplice “with suspicion and great caution”).

Torrence further argued that, as this Court held in *Smith v. State*,<sup>9</sup> his trial counsel's failure to request a *Bland* instruction constituted ineffective assistance of counsel.

(11) The motion was referred to a Superior Court Commissioner. The Commissioner concluded that *Smith* had no application to Torrence's case because Torrence had been tried as a principal and not solely as an accomplice.<sup>10</sup> By report and recommendation, the Commissioner found that Torrence's claims were procedurally barred and recommended that the motion be summarily dismissed. By order dated November 3, 2010, the Superior Court adopted the Commissioner's report and denied Torrence's third postconviction motion. This appeal followed.

(12) In his opening brief on appeal, Torrence again argues that the testimony of his codefendants was conflicting and, thus, uncorroborated. Accordingly, Torrence argues, the Superior Court erred in failing to give a *Bland* instruction to the jury, and his trial counsel was ineffective for failing to request the instruction. After the briefs were filed, we stayed the appeal until we decided *Brooks v. State* and *Owens v. State* (collectively, *Brooks*),<sup>11</sup> two cases that were consolidated for decision in order to address how a jury should be instructed on the issue of accomplice testimony. After we issued

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<sup>9</sup> *Smith v. State*, 991 A.2d 1169 (Del. 2010).

<sup>10</sup> See *White v. State*, 2010 WL 1781021 (Del. May 4, 2010).

<sup>11</sup> *Brooks v. State*, 40 A.3d 346 (Del. 2012).

our decision in *Brooks*, the parties in this appeal filed supplemental memoranda. The matter was then submitted for decision.

(13) In his opening brief as supplemented, Torrence contends that the testimony of Cooper and Kattes was uncorroborated and irreconcilable. Thus, Torrence argues, the Superior Court committed plain error in failing to give a proper *Bland* instruction regarding accomplice testimony. Torrence also argues that his trial counsel was ineffective under *Smith* for not requesting the *Bland* instruction.

(14) In its supplemental answering memorandum, the State concedes that, pursuant to this Court's recent holding in *Brooks*, the Superior Court was required to instruct the jury on accomplice testimony. The State further concedes that the accomplice testimony instruction that the Superior Court gave to Torrence's jury differs from the jury instruction on accomplice testimony that is now mandated by *Brooks*.<sup>12</sup> The State points out, however, that *Brooks* does not apply retroactively. Consequently, the State argues, the Superior Court adequately instructed the jury on accomplice testimony under the law as it existed at that time, which allowed the Superior Court some discretion to modify the *Bland* instruction. Thus, according to the State, the Superior Court did not commit plain error in failing to give the exact *Bland*

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<sup>12</sup> See *id.* at 350 (setting forth the required jury instruction on accomplice testimony).

instruction, and trial counsel was not ineffective for failing to object to the instruction as given.

(15) In order to establish a claim of ineffective assistance of counsel, a defendant must prove that: (a) counsel's representation fell below an objective standard of reasonableness; and (b) there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.<sup>13</sup> There is a strong presumption that counsel's representation was professionally reasonable.<sup>14</sup> In this case, because we find no error in the jury instruction as given, we conclude that counsel was not ineffective for failing to object to it.

(16) In reviewing the sufficiency of a jury instruction, this Court will read the instructions as a whole to determine if the trial court accurately instructed the jury on the law.<sup>15</sup> Some inaccuracies and inaptness of language are to be expected in any jury charge.<sup>16</sup> The relevant consideration is whether the instructions as a whole are reasonably informative, not misleading, and allowed the jury to intelligently perform its duty in returning a verdict.<sup>17</sup>

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<sup>13</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>14</sup> *Id.* at 689.

<sup>15</sup> *Hankins v. State*, 976 A.2d 839, 842 (Del. 2009).

<sup>16</sup> *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983).

<sup>17</sup> *Hankins v. State*, 976 at 842.



(17) In *Cabrera v. State*,<sup>18</sup> we upheld an accomplice testimony instruction as “adequate” even though the instruction did not use the phrase “suspicion and great caution” that was mandated in *Bland*. In considering the accomplice testimony instruction as a whole in Torrence’s case, we find that the instruction was reasonably informative, not misleading, and allowed the jury to intelligently perform its duty in returning a verdict.<sup>19</sup> The instruction given in Torrence’s case, in fact, is similar to the jury instruction we recently upheld in *Brooks*.<sup>20</sup> Torrence’s jury was instructed to consider the accomplice testimony with “particular care” and warned them the testimony may be affected by self-interest and the accomplices’ plea agreements. Under the circumstances, we find no error in the instruction. We thus conclude that counsel’s failure to object to the instruction did not amount to ineffective assistance.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>18</sup> *Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000).

<sup>19</sup> *Hankins v. State*, 976 A.2d at 842.

<sup>20</sup> *See Brooks v. State*, 40 A.3d at 346.